United States of America.

In the Supreme Court

OF THE

UNITED STATES.

CASE NO. 1192.

JOHN D. ROBY and JAMES D. RANKIN, *Plaintiffs in Error,*
vs.
RELIEF JACKSON,
Defendant in Error.

ASSIGNMENT OF ERRORS.

Now come the said John D. Roby and James D. Rankin and say, that in the record and proceedings aforesaid there is manifest error in this, to wit:

I.

The Court erred in admitting in evidence the location certificate offered by plaintiff Jackson.

II.

The Court erred in admitting in evidence the various deeds from alleged locators and others, to plaintiff Jackson.

III.

The Court erred in refusing to give to the jury the following instructions prayed by defendants Roby and Rankin, and numbered one, two and three, to wit:

First—The jury are instructed that a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of location. It does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse or is generally disregarded.

Second—It is for you to determine whether the one hundred or two hundred feet limitation, in Spalding mining district, had fallen into disuse or was really in force at the date of defendants' location. If it was not in force, then in that particular, if otherwise valid, and the ground was open to location or re-location, then the defendants' location was good and valid to the extent of twenty-three forty-nine one hundredths acres. If you believe that the limitation was in force, then it was void as to the excess over one hundred feet or two hundred feet up and down the Blue river, and in width from hill to hill, but valid to that extent, if otherwise good, and no more.

Third—The jury are instructed that it is not necessary to sink a discovery hole or shaft to the depth of ten feet, upon a placer claim, but all that is necessary is to make a discovery of mineral previous to location.

IV

The Court erred in charging the jury that defendants, Roby and Rankin, had not established a title satisfactory for the consideration of the jury.

V.

The Court erred in directing the jury to return a verdict that there was no title to the ground in controversy, in the defendants Roby and Rankin.

VI.

There was error in this, that the Judge did not nonsuit the plaintiff Jackson, for the reason that he did not offer testimony to show that the locators of the so-called Klak claim, and the plaintiff, were citizens of the United States or had declared their intention to become citizens.

By reason whereof, the said John D. Roby and James D. Rankin pray that said judgment may be reversed, etc.

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BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

The plaintiff, Jackson, offered in evidence a pretended location certificate to the Klak claim. Defendants Roby and Rankin objected to its admission for the reason that no usage, or custom, or rule of miners, concerning the size and location of placer claims, had been shown, or that the certificate was made according to the local rules of the district, or any law, or that the boundaries had been staked or marked, or a discovery of mineral shown.

The objections were based upon a decision of the Supreme Court of Colorado, as follows, viz.:

"To give effect to such rules, usages and customs, the Legislative Assembly, by an act approved November 7, 1861, (1 Sess., 168,) enacted that all rights of occupancy, possession and enjoyment of any tract or portion of the public domain acquired before the passage of that act, should be ascertained, adjudged and determined by the local law of the district or precinct in which such tract was situated, as it existed on the day when such rights were acquired; and if there was no such local law, then by the common custom prevailing in respect to such property; and this provision was retained in the Revised Statutes of 1868 (531), and is still in force. The validity and force of such rules, usages and customs has also been recognized by Congress, (13 Statutes at Large, 441; 14 *Id.*, 251; 17 *Id.*, 91), and by the Supreme Court, (Sparrow vs. Strong, 3 Wall., 97), by which they are established without doubt or question. We may, therefore, assume that a valid location of the claim in dispute could have been made in the year 1860 only according to the rules, usages and customs of the miners in Illinois Central District, where it is situated, prevailing at that time, and it is important to determine in what manner such rules, usages and customs are to be ascertained. To say that the Court is advised as to the nature and extent of such regulations is contrary to the fact, and therefore they cannot be the subject of judicial notice. * * * * * Whenever a copy of the rules can be had, no other evidence of them should be received, for in this, as in all other cases where a fact is to be proved, the law demands reasonable diligence in procuring the best evidence at command. An early statute required that the records, laws and proceedings of mining districts should be deposited in the office of the county clerk (1 Sess., 167), and for the purpose of introducing secondary evidence, it may be sufficient in the first instance to show that the

local laws of the district are not of record in that office, Such proof was made by appellees upon the trial below, and it was not contended that a copy of the rules of the district was accessible; oral or other evidence tending to explain or establish the fact was clearly admissible. There was, however, but little evidence offered upon the trial respecting the rules and customs of Illinois Central District, and that was directed to one point—the length of the discovery claim. No effort was made to show what was necessary to be done in locating a claim in that district, or that anything was done according to local regulations. It may have been necessary to sink a shaft on the claim, or to define the location by monuments, or in some other way. We cannot assume that a certificate of location on the records of the district was all that was necessary to make a valid title to a mining claim, or, indeed, that the certificate itself was made according to the local rules of the district. The evidence should show the essential features of a good location in that district, and that Wilson made such a location of the claim in dispute."

Hense vs. Sullivan, 2 Colo., 424.

The location of the Klak claim was claimed in April, 1869; that was before any State law or act of Congress was passed concerning placer claims. The first law of Colorado on the subject was enacted in 1879, and the first act of Congress on the subject was approved July 9, 1870.

Hence, "a valid location of the claim in dispute could have been made in the year 1869, only according to the rules, usages and customs of miners in the district where it is situated, prevailing at that time."

As in the case of Hense vs. Sullivan, *supra*, the only evidence of custom was as to length of claim, and that was 200 feet. No effort was made to show what was

necessary to be done, or that anything was done, according to local regulations.

In fact, the location certificate offered by plaintiff, Jackson, disclosed a claim 1,000 feet in length.

There was no proof as to the rules of miners to show that the location was in accordance therewith, and their absence was not accounted for.

It is presumed that there were written laws in force in Spalding mining district at that time.

King vs. Edwards, 1 Mont., 236.
Campbell vs. Rankin, 2 Mont., 363.

There was no proof that the boundaries had ever been staked or marked.

This is required before location certificate can be recorded or offered in evidence.

Hess vs. Winder, 30 Cal., 349.
Mallett vs. U. S. M. Co., 1 Nev., 194.

There was no proof whatever of a discovery of mineral before the location certificate was recorded or offered in evidence.

This was necessary.

Defendants, Roby and Rankin, contended in the Court below, and now contend, that the Court did "assume that a certificate of location was all that was necessary to make a valid title to a mining claim."

There was nothing to show "that the certificate itself was made according to the local rules of the district."

The evidence did not "show the essential features of a good location in that district;" and the Court erred in admitting the certificate in evidence.

II.

The deeds offered in evidence should not have been received, on account of the valid objections to the location certificate, and for the reason that no title had been shown in locators, and hence none could be conveyed.

Hense vs. Sullivan, *supra.*

III.

There could not have been any objection to the giving of the instructions prayed by Roby and Rankin. The first two embraced the law.

Harvey vs. Ryan, 42 Cal., 626.
N. N. M. Co. vs. Orient M. Co., 6 Saw., 299, 305, 307.
Jupiter M. Co., vs. Bodie Cons. M. Co., 7 Saw., 96.

Evidence was introduced by defendants, Roby and Rankin, to prove that the ground in controversy was vacant and unoccupied at date of their location, except that part of it was occupied by Bartlett and Shock, and their claim purchased. They introduced testimony to prove that when they located, the old rules, customs and usages had fallen into disuse, and that locations of placer claims were then made in accordance with the law of Colorado of 1879, and the acts of Congress, approved July 9, 1870, and May 10, 1872, and that they complied with all of such laws.

Transcript of Record, folios 42 to 45.

The third instruction was prayed to prevent the jury from misapplying the law of Colorado regarding the location of lode claims, which requires the discoverer of a *lode* to sink a shaft ten feet deep before he can locate a claim. The instruction should have been given, as the

testimony showed a discovery of placer mineral, by Roby and Rankin, prior to their location.

Transcript of Record, folio 44.

IV.

The Court refused to allow the jury to consider the case upon the evidence offered by Roby and Rankin. Error is assigned upon such refusal.

The defendants below, Roby and Rankin, contended and proved: 1. That the ground claimed by them and in controversy, was vacant and unoccupied mineral land. 2. That they were citizens of the United States. 3. That at the date of their location there were placer laws in force in Colorado and the United States. 4. That it was the custom and usage of placer miners to locate in accordance therewith, not to exceed forty acres when there were two or more locators; and 5. That they had in all respects complied with the customs and usages of miners, and the laws of Colorado and of the United States, in making their location, after mineral was discovered.

Transcript of Record, folios 42 to 45.
Session Laws of Colorado, 1879, p 140.
Rev. St. of U. S., Secs. 2330, 2331.

Such evidence entitled them to go to the jury.

V.

Again, the Court erred in directing the verdict and taking the case from the jury, for the reason that the act of Congress, approved March 3d, 1881, expressly says that it is for the *jury to find* that neither party has established title to the ground in controversy. That act makes it the special province of the jury to so find.

VI.

The plaintiff, Jackson, did not offer any testimony to show that the pretended locators of the alleged Klak claim, viz.: Thomas Klak, Joseph Hildebrand, James McCullough, Claus Berenz and Patrick Cassiday were citizens of the United States, or had declared their intention to become such, or were competent to locate mining property in the State of Colorado. Neither was any testimony offered to prove that the plaintiff Jackson was a citizen of the United States, or had declared his intention to become such, or entitled to hold the title to mining property.

Such testimony should have been offered as a condition precedent to location and possession of such property.

Rev. St. of U. S., Sec. 2319.
14 Statutes at Large, 251.

That section was in force at date of pretended location of Klak claim.

Such defect of testimony on the part of plaintiff in the Court below was sufficient to have warranted the Court in nonsuiting the plaintiff, and in directing the jury to have returned a verdict for the defendants, Roby and Rankin.

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